80-1510

No.

Office-Supreme Co
FILE
MAR 19 19
ALEXANDER L. ST
CLERK

In The

Supreme Court of the United States

MARCH TERM, 1981

JAMES R. KURTZ,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

LEE CLARY, ESQ.
District Attorney
Jefferson County
Attorney for Respondent
175 Arsenal Street
Watertown, New York 13601
Telephone: (315) 785-3053

TABLE OF CONTENTS

	Page
Opinions Below	1
Question Presented	2
Statement of the Case	2
Why the Writ Should Be Denied	4
Conclusion	6

APPENDIX
Excerpts from
Trial Transcript of Watertown City Court

Opening Statement by Mr. Harberson	A-1
Motion	A-2
Motion and Opening Statement by Mr. McClusky	A-5

TABLE OF AUTHORITIES

Cases: Page

Burks v. United States, 423 U.S. 23, 98 S.Ct. 2141 at 2148 4

Burks v. United States, 437 U.S. 1, 14-18, 98 S.Ct. 2141 .. 5

Lee v. United States, 432 U.S. 23, 97 S.Ct. 2141 ..... 4, 5

United States v. Scott, 437 U.S. 82, 94-99, 98 S.Ct. 2187 .. 5

Other Authorities:

New York State Criminal Procedure Law

Section 210.20 subd 4 3

Section 210.20(h) 5

Section 260.30 2

Vehicle and Traffic Law, Sections 1180, 1192. 2

In The

Supreme Court of the United States

MARCH TERM, 1981

No.

JAMES R. KURTZ,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The People of the State of New York, the respondents herein, respectfully request that petitioner's petition for a writ of certiorari be denied in all respects.

OPINIONS BELOW

The opinion of the Watertown City Court, the trial court herein, on the motion for dismissal is unreported and is printed in Appendix A hereto *infra* pg. A-1.

The opinion of the County Court for Jefferson County, New York, which affirmed in part and reversed in part the decision of City Court is reported at 101 Misc.2d 964 (1980).

The New York Court of Appeals decision which affirmed the County Court ruling is reported at 51 N.Y.2d 380, 434 N.Y.S.2d 200, ____ N.E.2d ____ (1980).

QUESTION PRESENTED

Whether constitutional or statutory double jeopardy provisions prohibit retrial after the trial court has dismissed the accusatory instrument on the defendant's own motion on the grounds that the prosecutor had procedurally failed to make an adequate opening statement as required by Section 260.30 of the New York State Criminal Procedure Law.

STATEMENT OF THE CASE

On March 2, 1979, the defendant was arrested and charged in a simplified traffic information with speeding and driving while intoxicated. (Vehicle and Traffic Law, Sections 1180, 1192.) On June 20, 1979, trial was held in City Court, City of Watertown. After the jury was selected and sworn, the prosecutor delivered his opening statement. Immediately thereafter, defense counsel moved to dismiss the information on the ground that the People's opening statement was inadequate as a matter of law. After arguments were heard in chambers, the trial court reserved decision on the motion. Over the objection of the prosecutor, who offered to amplify any inadequacies in his opening, the trial continued at the behest of defense counsel. After one witness had testified, the trial was recessed for the afternoon. The following day, the prosecutor moved for permission to supplement his opening statement to the jury. Defense counsel objected to this motion on procedural grounds. Shortly thereafter, the trial court denied the prosecutor's motion to supplement his opening and then dismissed the information on the ground that the prosecutor's opening statement to the jury was insufficient as a matter of law. At no time during these proceedings did defense counsel raise the issue of double jeopardy and at no time did the City Court Judge base his decision on principles of double jeopardy. The issue of double jeopardy was first raised on appeal of the city court's decision to county court.

On December 6, 1979, the County Court of Jefferson County reversed and remanded the case to City Court for a new trial. While County Court agreed with the trial court that the prosecutor's opening statement was inadequate in that it failed to state any of the facts constituting the offenses which the prosecutor intended to prove, County Court disapproved of the procedure utilized by the trial court subsequent to the defendant's motion to dismiss and further disapproved of the trial court's mistaken reliance upon Section 210.20 subdivision 4 of the New York State Criminal Procedure Law concerning rights of appeal. The Court stated that the trial court should have determined the motion before allowing the trial to continue and, upon deciding the prosecutor's opening statement was inadequate, it should have permitted the prosecutor to supplement his opening to the jury. Finally, County Court rejected defendant's contention that a reversal and new trial was barred by the doctrine of Double Jeopardy. The court held that retrial was not precluded as "it was the defendant's motion that concluded the trial proceedings prior to an evidentiary determination on the merits."

On November 25, 1980, the New York Court of Appeals affirmed the judgment of County Court, agreeing that, although the prosecutor's statement was inadequate as a matter of law, the trial court had not made an adjudication of the merits of the case which would preclude a reprosecution of the petitioner. The court further stressed that it was the nature of the order that should govern the possibility of reprosecution. (*See*, 51 N.Y.2d 380, 434 N.Y.S.2d 200, 204 (1980).)

The People submit that there is no double jeopardy bar to the defendant's reprosecution and ask that the petitioner's application for a writ of certiorari be denied in all respects.

WHY THE WRIT SHOULD BE DENIED

The decisions of the Jefferson County Court and the New York Court of Appeals below are direct applications of this Court's rulings on the doctrine of double jeopardy.

At the outset, it is important to note that the key factor in this case is that the trial court's mid-trial dismissal in no sense resembled an acquittal of the petitioner. Indeed, it appears to have been functionally indistinguishable from a declaration of a mistrial. (*See, Lee v. United States*, 432 U.S. 23, 97 S.Ct. 2141.)

In granting the petitioner's motion, the trial court had not acquitted the defendant nor had it ruled on the sufficiency of the charges against the petitioner. The trial court had merely evaluated the prosecutor's opening statement, which was not evidence, and had found that it was insufficient as a matter of law. Thus, the People had failed procedurally in not complying with the New York State Criminal Procedure Law order of jury trial proceedings. Indeed, the trial court, when dismissing the impanelled jury, had pointedly declared its decision to dismiss was based on a "question of pure law" not related to the jury's fact finding function. (*See*, trial transcript, Appendix pp. A- .) It is also clear from the record that the prosecutor had not committed this error in bad faith nor with any desire to provoke the defendant's motion.

It is the People's position that, although jeopardy had attached with the selection of a jury, under these circumstances, there is no basis for holding that the defendant will be placed twice in jeopardy by reprosecution since it was the defendant's own motion and subsequent actions that concluded the trial proceedings prior to an evidentiary determination. (*See, Burks v. United States*, 423 U.S. 23, 98 S.Ct. 2141 at 2148.)

During recent years, the doctrine of double jeopardy has been in a state of constant re-examination by this Court. As presently constituted, the doctrine distinguishes between trial orders

terminating the trial in the defendant's favor prior to any determination of guilt or innocence and those orders which terminate the trial based on evidentiary insufficiency. (*See, Burks v. United States*, 437 U.S. 1, 14-18, 98 S.Ct. 2141; *United States v. Scott*, 437 U.S. 82, 94-99, 98 S.Ct. 2187.) Because a dismissal based on insufficient evidence is tantamount to an acquittal, re-prosecution is precluded in the latter category of cases. Retrial of cases falling within the former category of dismissals, however, is permissible because the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to the factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy clause. (*See, United States v. Scott, supra*, at pp. 98-99.)

The object of this rule is to ensure that a defendant does not escape a just verdict due to a dismissal based upon a correctable technicality which does not dispose of the issue of guilt or innocence on the merits. Such dismissals are functionally indistinguishable from declarations of a mistrial and do not bar re-prosecution so long as the motions are made by the defendant and the error prompting the motion is not motivated by bad faith. (*See, Lee v. United States, supra*, 29-34; *United States v. Scott, supra.*)

In the instant case, the People submit that the trial court had erroneously dismissed the petitioner's charges, improperly relying on Section 210.20 (h) of the New York State Criminal Procedure Law. Furthermore, by requesting the dismissal and at the same time urging that the trial proceed, the petitioner is now in no position to claim the protection of the double jeopardy clause. Due to his actions which helped abort the trial, he ought not readily be able to succeed in erecting a constitutional shelter against re-prosecution based on double jeopardy. Such a bar to reprosecution would pervert the intent of the Fifth Amendment and this Court's prior constructions of its protections.

CONCLUSION

For the aforementioned reasons the People of the State of New York assert that the reprosecution of the petitioner is not barred by the possibility of double jeopardy and request that the petitioner's application for a Writ of Certiorari be denied in all respects.

Respectfully submitted,

LEE CLARY, ESQ.
District Attorney
Jefferson County
Attorney for Respondent
175 Arsenal Street
Watertown, New York 13601
Telephone: (315) 785-3053

APPENDIX

Excerpts from
Trial Transcript of Watertown City Court

OPENING STATEMENT BY MR. HARBERSON

[18]

• • •

Harberson?

MR. HARBERSON: Yes, your Honor.

THE COURT: Mr. McClusky?

MR. McCLUSKY: Ready, your Honor.

THE COURT: All right, the defendant is present in the courtroom. Ladies and Gentlemen, at this time the procedure is that the attorneys will give you their opening addresses and this is done prosecution first. Mr. Harberson.

MR. HARBERSON: I'm going to call several police officers who are going to testify as to the condition of the defendant on the night in question. I'm going to ask them to describe to you what they saw and heard. I'm going to have some testimony about an instrument that records a breath sample and the reading from that instrument. There will be some evidence given from another officer as to how that instrument is kept accurate and also some testimony as to the way the machine is run. I would hope that at the end of all of that testimony to also present evidence as to a speeding charge which is part of your consideration. Again, the two officers making the arrest will testify as to the elements of

[19]

the speeding charge. The witnesses have already been listed to you by the Court but I'll go over them once more, Patrolman Fuhrken, Scott, VanBrocklin, and Marshall. Thank you.

MR. McCLUSKY: If the Court please, at this time I would have a motion outside of the hearing of the jury, if I may.

Opening Statement by Mr. Harberson

THE COURT: All right, Gentlemen, I think the easiest way to do it would be for us to recess to Chambers and allow the jury to sit here. I'll have to give the jury their customary warning.

(Preliminary Instructions Given to Jury.)

THE COURT: The Court will take a brief recess.

(At 3:37 p.m., Court recessed to Chambers.)

IN CHAMBERS:

MR. McCLUSKY: I can't find the specific section at this time, your Honor, however it is my understanding that the Criminal Procedure Law makes it incumbant upon the People to give an opening

[20]

statement and in that opening statement they're suppose to state what they are going to prove. Therefore, at this time I would move to dismiss that part of the People's case dealing with Sections 1192, Subdivisions 2 and 3. As I heard the opening statement, Mr. Harberson just said that there's going to be some police officers testify, that they were going to talk about something about the defendant, and he didn't really say anymore than that. He did say there was going to be proof of speeding, but I didn't hear anything about any proof of driving while intoxicated.

MOTION

THE COURT: Mr. Harberson, you may speak or you may wait until Mr. McClusky and I locate what's suppose to be said in an opening.

MR. HARBERSON: I'd ask the stenographer to read back my opening statement.

THE COURT: Let's hold up until we find the law that pertains and then perhaps we can get to that.

MR. McCLUSKY: I have no objection to that, Judge. I might have missed it.

THE COURT: Off the record.

[21]

(Off the record discussion.)

THE COURT: Back on the record. The matter was held up here in Chambers so that we could research the law. A brief research has been done. Mr. McClusky, you were making the motion. Would you please continue.

MR. McCLUSKY: Well, I would request until tomorrow morning, Judge, to be allowed to submit some law inasmuch as I have not had an opportunity to research it.

THE COURT: Mr. Harberson?

MR. McCLUSKY: Your Honor, I'd ask that the stenographer read back my opening statement.

THE COURT: All right. Would you please do that?

(Court Reporter read back Mr. Harberson's opening statement, pages 18-19.)

THE COURT: Mr. Harberson, the stenographer has just read your opening address back to you. What remarks do you wish to place on the record at this point?

MR. HARBERSON: Well, your Honor, the

[22]

charge in this case is driving while intoxicated. I have indicated to the jury that I intend to present people who will verify the actions of the defendant on the night in question and their

observations and the machine that was used. And then I moved over to the speeding charge. I think that these are the two charges we're dealing with and the elements of them would come from the witnesses. For the People to comment on what they were going to say or give an opinion on their weight or sufficiency I think is a question of fact for the jury. I would embellish their weight but I think that enters a prejudicial area and I avoided it.

THE COURT: All right, Gentlemen, I'm going to do what I feel to be the best thing here which is allow Mr. McClusky to supply me with some law, to reserve decision, to go out there now and continue to try this case. I'll reserve decision until after I have reviewed the authorities.

MR. McCLUSKY: That's agreeable with the defendant, your Honor.

THE COURT: All right. Is that agreeable with the prosecutor, Mr. Harberson?

[23]

MR. HARBERSON: I still think, your Honor, that we have a jury and we have people, Mr. McClusky and his client, if you feel that we just proceed and waste everybody's time if you're going to say from the beginning that there is—

THE COURT: I don't know what I'm going to say from the beginning, Mr. Harberson. I have no idea until I read the law.

MR. McCLUSKY: May I comment on that?

THE COURT: You may add something to the record if you wish.

MR. McCLUSKY: Not to be argumentative, but Mr. Harberson requested this very solution when I made another motion earlier, to go on with the trial and decide it later on. It does not

seem logical to me that he would not go along with the Court's suggestion.

THE COURT: Gentlemen, I don't feel that I'm inconveniencing or that you're inconveniencing anyone greatly. It's ten minutes to four. This trial will shortly be recessed for the afternoon and I don't anticipate a great deal of time will be taken

[24]

by Mr. McClusky to supply me with some authorities. All right, let's get back to the business of trying the case.

(At 3:50 p.m., Court resumes in Courtroom with Jury present.)

THE COURT: All right, Ladies and Gentlemen, when we recessed the prosecutor had just concluded his opening remarks. Mr. McClusky.

MOTION AND OPENING STATEMENT BY MR. McCLUSKY

MR. McCLUSKY: If the Court please, Mr. Harberson, Ladies and Gentlemen, at this point of trial the defendant has the opportunity, or his attorney does, to make a statement to you as to what he feels the proof will be or will not be. I feel that the proof here will be somewhat as to a type of – and I think the police officers will probably testify to this – a selective prosecution of Jim Kurtz. That in fact he was not intoxicated, he had a few beers the night in question, but he was not intoxicated and therefore not operating his vehicle while in an intoxicated condition. I feel – and that's why I asked questions of some of the jurors that served on the other jury – because I feel that there's going to be a question of this machine here. There

• • •

[71]

IN CHAMBERS – JURY NOT PRESENT:

THE COURT: During the course of the trial yesterday and following the opening by the Assistant District Attorney, a motion was made by the attorney for the defense to dismiss on the grounds that the opening was insufficient. Decision was reserved and I should note that parties of both the attorney for the defendant and the prosecutor were allowed oral argument off the record earlier this morning here before me and that at this point I am asking first Mr. McClusky who made the motion whether or not he has anything to add at this point.

MR. McCLUSKY: Nothing other than the cases I've submitted, your Honor, and that I said originally that if there were any proper opening it only went to the speeding charge and not the other charge.

THE COURT: All right, do you have anything you wish to add, Mr. Harberson?

MR. HARBERSON: Only, your Honor, that if the Court feels the opening was insufficient I would amend it to reflect more information about what I intend to prove. Furthermore, I believe that the opening I made was sufficient. My concern was

[72]

not to put before the jury my feelings or my opinion or use words that tended to prove the case, but rather let witnesses in their own words identify the facts so that the jury can draw its own conclusion. Also I feel that if this case at this time were terminated it would not be on the merits. The first witness has been sworn and testimony taken and the people would have a right to rearrest the defendant and proceed on a new trial.

THE COURT: Mr. McClusky, the prosecutor has made an offer to amend his opening statement. I believe that there is some

language about that in one of the decisions in the People vs. Coppa. Do you have any statement you'd like to address to that?

MR. McCLUSKY: Nothing really, Judge, other than I objected to that before and at this point I don't see procedurely how the District Attorney could make an opening during the trial inasmuch as we have proceeded and are through with one witness.

THE COURT: All right.

MR. HARBERSON: But that was because the Court directed us to continue, your Honor. I was

[73]

unwilling to continue until we settled this issue before.

THE COURT: All right, Gentlemen, I think the matter is of sufficient moment for me to make a few notes before announcing my decision. I'd ask your indulgence for approximately another quarter hour to allow me to review the authorities once more.

MR. HARBERSON: Your Honor, may I suggest that we send the jury home and the witnesses and start again at 1:30?

THE COURT: Well, let's wait till I make my decision so I can advise the jury as to whether or not they'll be needed. I'm going to have to make an outline as to where I'm going. We can advise the jury within the next few minutes.

MR. HARBERSON: In any event, can I send my witnesses to lunch?

THE COURT: Yes, we won't be needing them,

(At 11:45 a.m., Court recessed.)

(At 11:57 a.m., Court resumed.)

[74]

IN CHAMBERS:

THE COURT: This is a decision on Mr. McClusky's motion to dismiss for failure to properly open on behalf of the prosecutor. This is a serious motion that goes to the heart of this particular case in my opinion, and I have asked counsel to do research. They have. I thank them. We've had long discussions concerning it. First of all, I would like to read the predecessor to the present Criminal Procedure Law, Section 260.30(3), which is the Code of Criminal Procedure, Section 388(1). Along with the heading sentence that reads as follows: "The jury having been impaneled and sworn, the trial must proceed in the following order: 1) The District Attorney or other counsel for the People must open the case." As enacted and is still true to date, the Criminal Procedure Law which supplanted the Code of Criminal Procedure, particular Section 260.30(3), together with the head sentence reads as follows: "The order of a jury trial in general is as follows: 3) The People must deliver an opening address to the jury." I do not find any significant different in the two statutes wherein the District Attorney's duties

[75]

are set forth at either greater or lesser length. I find them practically identical, and therefore for that reason I believe that portion of the law which pertained to Section 388(1) in the nature of cited cases is probably still good law and applies to Section 260.30(3) of the Criminal Procedure Law. To that end I will quote Pitler's, The New York Criminal Practice at Page 640, Section 12.31. "The CPL requirement for an opening statement by the People continues the practice prescribed by Subdivision 1 of Section 388 of the Code of Criminal Procedure." And at Page 641 I again quote, "Pre-CPL decisions seem to require that facts constituting the crime had to be set forth in the opening ad-

dress." I now quote again from an authoritative, see Zett, New York Criminal Practice, Volume 6 at Page 44072, Paragraph 44.101, "Thus, the opening statement should be designed to acquaint the jury with the nature of the case and the issues of fact involved." On Page 44-72 under Paragraph 44.102, and I will again quote, "Additionally he is" — referring to the prosecutor — "advised to detail significant facts which support the allegations made in the indictment or information."

[76]

Continuing, "The prosecutor during his opening statement is advised to make an affirmative statement of ultimate facts to protect against the defense motion to dismiss after the People's opening statement on the grounds of failure to state a prima facie case." Subdivision B at Page 44-72 I'll further quote from. "It has been held that the purpose of the People's opening statement is to afford the jury a preview of issues for their further understanding and to allow them to more intelligently follow the evidence that is adduced at trial. In short, the opening constitutes the prosecution's introduction of the case to the jury and is a capsulized view of the evidence to be presented." I heard yesterday originally the prosecutor's opening statement and yesterday I had our stenographer read it back to me. For purposes of this decision, within the last twenty minutes I had it read back to me again. I find from the law that I have just cited and other authorities cited to me this morning that under the guidelines given by these authorities the prosecutor's address or opening to the jury was insufficient and I grant the motion to dismiss on that ground. I will further

[77]

add — and I am now referring to the case of People against Coppa at 394 Supp. 2nd, 219, at Page 222 — There is no jurisdiction in this Court to entertain the appeal — this was in

my own words now. This was later commented on and reversed by the Court of Appeals, but the following statement was not mentioned by the Court of appeals: "And a resubmission of the matter to the grand jury is precluded by Subdivision 4 of CPL 210.20. That states in fact, 210.20(4), "Upon dismissing an indictment or a count thereof upon any of the grounds specified in Paragraphs a, b, c, and i of Subdivision 1, the Court may upon application of the People in its discretion authorize the People to submit the charge or charges to the same or another grand jury. When the dismissal is based upon some other ground, such authorization may not be granted. In the absence of authorization to resubmit, the order of dismissal constitutes a bar to any further prosecution of such charge or charges by indictment or otherwise, in any criminal court within the county." And elsewhere in the Criminal Procedure Law in relation to informations — and I refer to Section 170.45 of the Criminal Procedure Law and other areas as well —

[78]

I firmly believe that the motion to dismiss this information based on that section and on others is controlled by Section 210.20, and I therefore find that this is a final determination, outside of any rights of appeal, that the People have, and that a resubmission is precluded by Section 210.20(4) and the Coppa case. I will therefore at this time, Gentlemen, excuse the jury.

MR. McCLUSKY: Thank you, Judge.

(In Open Court at 12:09 p.m., Court resumes. Mr. Harberson not present.)

THE COURT: I note the prosecutor is not here. I don't know where he is. Mr. McClusky, do you want to see if he intends to come in?

MR. McCLUSKY: I think he might have left, Judge.

(Mr. McClusky left courtroom and returned momentarily.)

MR. McCLUSKY: He's gone, Judge.

THE COURT: All right, I will proceed in any event so I will not unduly delay the jury. Ladies and Gentlemen, I apologize for holding

[79]

you up this morning. I want to advise you that the reason for the delay was that I had to consider some serious questions of law which were raised by the attorneys in Chambers. I have done that and as a result of my consideration of the law I have decided to dismiss the case at this time on a question of pure law. It has nothing in fact to do with any deliberations that were going to be put to you and it has nothing to do with you as jurors. That is my prerogative and you'll recall when I gave you your instructions that certain prerogatives were mine and certain prerogatives were yours, and I chose to exercise mine. Under the circumstances, the charge now being dismissed, you're still on the jury panel and I believe that your next time for appearance in this Court is on Monday morning. I do not believe we'll have another case ready for you until then. So thank you very much for being here and for your service and for your many hours. You appeared to be very attentive and we appreciate that. We'll see you back here Monday morning at 10 o'clock. Court's in recess.

(At 12:13 p.m., Court recessed.)

• • •